IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 20, 2002

STATE OF TENNESSEE v. LORENZO EDWARD ERVIN, DAMON McGEE and RALPH PEDRO MITCHELL

Direct Appeal from the Criminal Court for Hamilton County
Nos. 223413, 223414 and 223415 Rebecca J. Stern, Judge

No. E2001-01147-CCA-R3-CD
May 29, 2003

The Hamilton County Grand Jury indicted the Defendants, Lorenzo Ervin, Damon Christian McGee, and Ralph Pedro Mitchell, for disrupting a meeting, a Class B misdemeanor. The grand jury also indicted Mitchell for resisting arrest. The Defendants' cases were consolidated for trial. A jury convicted all three Defendants of disrupting a meeting and convicted Mitchell of resisting arrest. The Defendants raise the following issues on appeal: (1) whether the trial court properly rejected the Defendants' claim that the State improperly discriminated against persons in selecting a jury, (2) whether there was sufficient evidence presented at trial to convict the Defendants of the charged offenses, (3) whether Tennessee Code Annotated § 39-17-306, the statute prohibiting the disruption of a meeting, is constitutional, (4) whether the trial court erred by instructing the jury regarding knowing or reckless conduct where the statute did not state a particular *mens rea*, (5) whether the trial court properly denied the Defendants' request for a mistrial premised on revelations that certain jurors had heard about media reports of events at the courthouse, (6) whether the trial court erred in excluding defense counsel's question calling for a legal conclusion. Finding no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Donna Robinson Miller (on appeal) and William A. Dobson, Jr., (at trial), Chattanooga, Tennessee, for the appellant, Lorenzo Ervin. Mike A. Little, Chattanooga, Tennessee, for the appellant, Damon McGee. John C. Cavett, Jr., Chattanooga, Tennessee, for the appellant, Ralph Pedro Mitchell.

Paul G. Summers, Attorney General and Reporter; Thomas E. Williams, III, Assistant Attorney General; William H. Cox, III, District Attorney General; Dean C. Ferraro and Mary Sullivan Moore, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL BACKGROUND

Carol O'Neal testified that she is the administrative clerk for the City Council of Chattanooga and that her job duties include maintaining all of the city's official records, numbering all of the documents that the council approves in open council meetings, and assisting the council members with scheduling issues. She stated that she had been the clerk since the council's inception ten years prior. O'Neal testified that there are nine people on the city council. She explained that during the council meetings, the council members sit on a raised platform similar to that of a courtroom and that she sits in front of the platform with her back towards the podium where people address the council.

O'Neal testified that the council meets every Tuesday at 6:00 p.m. She stated that in order to be placed on the agenda for council meetings, a person must make a request by 4:00 p.m. on the Thursday two weeks prior to the meeting. She stated that all requests to be on the agenda must be approved by the council prior to the meeting. She explained that approval must be obtained from the chairman, the vice-chairman, or two council members. O'Neal testified that there is a "special presentation section" of the agenda that is "usually reserved for special happenings within the city, awards presentations, special recognitions of [people] who have done something positive in the community, [and] different happenings that are going on in the community usually."

O'Neal recalled that on Monday, May 18, 1998, Reverend Elton Young called to request time for a special presentation at the meeting the following day. O'Neal testified that the council meeting was already "relatively long" because "[t]he agenda had been amended to incorporate resolutions that needed discussion at that particular council meeting." O'Neal maintained that neither the Defendants nor Reverend Young were approved to speak at the May 19, 1998 council meeting. She reviewed a copy of the May 19, 1998 agenda and stated that there was nothing on the agenda listed under special presentations.

O'Neal stated that she recognized Defendant Ervin at the May 19, 1998 meeting because he had attended previous council meetings at which he had addressed the council in a "very calm demeanor." O'Neal testified that the Defendant usually spoke at the end of the council meetings during the "non-agenda time" which is "an opportunity for the public to address the council regarding matters that are not on the agenda."

O'Neal stated that at some point during the May 19, 1998 meeting, Defendant Ervin approached her during a discussion of one of the ordinances and asked why he was not on the agenda. O'Neal indicated to Defendant Ervin that he did not receive approval to be placed on the agenda. O'Neal recalled that about eighteen or twenty minutes into the meeting, Defendant Ervin approached the podium and began speaking. A videotape of the council meeting was then shown to the jury. The videotape showed the Defendants approach the podium during the middle of the meeting and begin speaking. Defendant Ervin stated, "We're gonna do it our way." The videotape shows all three Defendants at a podium. The videotape also shows Defendant Ervin speaking into

the microphone with Defendants Mitchell and McGee behind him. Mitchell and McGee also appeared to be speaking and chanting. This conduct by the Defendants continued for several minutes until police removed them from the room.

Following a viewing of the videotape, Carol O'Neal was recalled to testify. She stated that the video accurately portrayed what occurred at the City Council meeting on May 19, 1998. O'Neal testified that a videographer from Channel 45 tapes all of the council meetings and then shows them on Channel 45 on the Thursday following the meeting. She stated that the Council could not have effectively continued the meeting because the Defendants were so loud.

On cross-examination, O'Neal testified that at the end of each council meeting, there is a period of time in which persons not listed on the agenda are allowed to speak. On the agenda, this time is listed as: "Recognition of persons wishing to address the council on non-agenda matters." O'Neal maintained that the Defendants would have been allowed to speak during that time. She identified an email from Councilman David Crockett which she stated that she received on July 6, 1998. O'Neal testified that the date on the email was May 19, 1998, and the time was 8:12 a.m. She acknowledged that in the email, David Crockett stated: "The presenters will be Reverend Young and Lorenzo Ervin."

O'Neal recalled that Defendant Ervin approached her during the council meeting and asked if he was on the agenda. She responded that he was not. O'Neal acknowledged that she did not tell Defendant Ervin that he would have an opportunity at the end of the meeting to speak to the Council. She testified that the time frame in which someone could be placed on the agenda was in the published rules of the council. O'Neal noted that at some point after the Council resumed the meeting, the Council interrupted the agenda and allowed Reverend Young and Mr. Kevin Mohammed to address the council on their issue. According to O'Neal, when Councilman Crockett interrupted the meeting, he announced the two men as a special presentation.

She testified that when Reverend Young called on the day before the May 19, 1998 meeting, she told him that she would have to speak to Councilman Crockett. After talking to Crockett, O'Neal told Reverend Young that his presentation would have to be considered as a non-agenda item. O'Neal acknowledged that at the time Reverend Young called, it was "preferred" that a person call two weeks in advance to schedule a special presentation, but it was "up to the chairman as to what he want[ed] to do with that." She testified that Ervin made reference to a document when he approached the podium. On re-direct examination, O'Neal stated that since the city council's inception in 1990, a meeting had never been interrupted to the degree that it was on May 19, 1998, forcing them to leave the city council room.

David W. Crockett testified that he had been a member of the Chattanooga City Council for ten years and that in May 1998, he was the council chairperson. According to Crockett, the chairperson is responsible for setting times for the agenda, setting items for committees, appointing the committees, presiding at the council meetings, and generally overseeing the activities of the

council. He stated that meetings are held every Tuesday at 6:00 p.m. and that all council meetings are open to the public.

Crockett stated that there are a number of ways in which issues may be brought before the City Council. He explained that issues may be brought to a committee for "longer, more interactive kind of discussions on issues," or they may be brought before the council "by getting scheduled into an agenda." He stated that most items that are placed on the agenda go through a committee. Crockett added that at every meeting, the public is allowed to speak on any subject over which the council has jurisdiction or authority. He stated that typically, items are placed on the agenda two weeks prior to the meeting and that items are approved for the agenda by the chairman or two members of the council. Crockett testified that if an item is requested within the two weeks prior to a meeting, he has discretion to allow it to be heard by the council.

Crockett testified that on the evening of May 18, 1998, Johnny Holloway contacted him and told him that Kevin Mohammed and Reverend Young would like to make a special presentation at the council meeting the following day. He stated that he conferred with several council members about the request. He also communicated via email with the Chief of Police and the Mayor's office. Crockett ultimately decided not to place Mohammed and Young on the agenda as a special presentation. He stated that he told Mr. Holloway that the group would not be allowed to make a special presentation but that they would have time to speak at the end of the meeting. Crockett believed that Holloway understood this decision because he "went over it a couple times verbally."

Crockett noted that Defendant Ervin had been to the City Council meetings at various times in the past and had on several occasions addressed the council during the non-agenda time. He stated that on May 19, 1998, Ervin approached the podium and began to speak. Crockett testified that he informed Ervin several times to wait his turn, but he was not sure if Ervin acknowledged his request. He stated that when it became apparent that Ervin was not going to cease, he excused the council and had the Defendants removed from the room. Crockett maintained that he would have been unable to continue business as usual after Ervin approached the podium. He stated that he did not bring the council back into the room until there was "order in the room" and "the folks who had started the disturbance had been removed."

Crockett testified that after the meeting resumed, he recognized Mr. Mohammed and Reverend Young, which he stated "was not normal, but under the circumstances, [he] was trying to use [his] judgment to make sure [they] had an orderly evening." He testified that he allowed them to speak when the council started to move from ordinances to resolutions during the meeting. Crockett recalled that the issues that Mohammed and Young addressed were the same as those that Ervin tried to address. He stated that the council typically does not alter the agenda, but he allowed Mohammed and Young to speak in an effort to avoid any further disturbances.

On cross-examination, Crockett testified that on May 18, 1998, prior to the call from Johnny Holloway, he was informed that a coalition wanted to address the council on the police shootings. Crockett maintained that he told Holloway that members of the coalition would be allowed to speak

at the end of the meeting, but he would not schedule them as a special presentation. He identified an email that he sent to Mayor John Kinsey and his Chief of Staff, Ken Hayes. Crockett stated that it was common for him to email the Mayor regarding issues that were before the council. He noted that in the email, he stated, "The presenters will be Reverend Young and Lorenzo Ervin." Thus, he acknowledged that he was aware that Ervin intended to speak at the meeting. Crockett testified that he had previously had people removed from the meeting room, but he had never had to have anyone forcibly removed.

Crockett testified that in the past when Defendant Ervin had addressed the council, Ervin had followed all of the rules and was never removed from the room. He stated that during non-agenda time, each person is allowed to speak for three minutes, and there is no limit on the number of people that can speak. Crockett testified that he was very clear with Mr. Holloway that the coalition would have to address the council at the end of the meeting. On re-direct examination, Crockett stated that the audience was not being disruptive before Ervin approached the podium.

Reverend Elton Young testified that he was a counselor and that he worked with the Coalition Against Police Brutality. He stated that all three Defendants were also involved with the coalition. Young attended the City Council meeting on May 19, 1998, and he recalled that he made attempts to place the coalition on the agenda for that evening. He stated that he spoke to Ms. O'Neal earlier that day about the possibility of getting on the agenda, and she informed him that it was too late to be placed on the agenda. O'Neal informed Young that he needed to speak to Councilman Crockett. Young testified that he asked Johnny Holloway to speak to Crockett.

Young testified that he spoke to Holloway after Holloway talked to Crockett. Young stated that he understood that they would not be placed on the agenda, but they would have an opportunity to speak at the conclusion of the agenda. According to Young, he told Ervin that they were not on the agenda but that they would have an opportunity to speak at the end of the meeting. He stated that it was "obvious" that Ervin was upset because the meeting was taking so long. Young testified that he assured Ervin and Mohammed that there would be an opportunity to speak at the end of the meeting. He stated that instead of waiting until the end of the meeting, Ervin "kind of broke into the meeting." Young stated that later in the meeting, his group was allowed to speak.

On cross-examination, Young testified that the coalition intended to present a proposal to the council addressing the problem of police brutality and police shootings. He stated that they wished to propose a citizen's review board for the police. Young testified that there was a written form specifying what was to be presented at the podium. He stated that he was able to make a presentation later in the evening prior to the end of the agenda. Young stated that he understood that David Crockett had been contacted regarding the coalition speaking at the meeting. He testified that when Ervin approached the podium, he addressed the council and not the audience.

Fred R. Layne testified that he is the traffic commander for the Chattanooga Police Department. He stated that in May 1998, he was also liaison officer to the City Council and that he was present at the meeting on May 19, 1998. He stated that at that meeting, there was a "larger than

usual crowd." Layne testified that while the Council was going through the agenda, Ervin "got out of his seat and went up to the podium and began to strike on the podium quite loudly, and said that he was tired of the garbage that he was listening to, it was time for him to say something." He recalled that Councilman Crockett hit the gavel several times in an effort to restore order to the meeting, but Ervin kept talking. He stated that Ervin shouted slogans such as, "No justice, no peace" and that Crockett could not get the meeting back to order.

Layne testified that at some point, Crockett indicated to him that he should "put a stop to it." He stated that he then walked over to the podium; asked the Defendants to be seated; and told them that if they did not sit, they would be arrested. Layne testified that the men "took a stance" and did not comply with the request, so he started moving toward Ervin. He stated that the audience was "being very loud and shouting back the slogans that [Ervin] was shouting." Layne testified that it "was very loud and hard to hear after that point." He stated that he radioed for backup and that Officers Todd Royval and Joseph R. Harper soon arrived.

On cross-examination, Layne testified that at no other time while he was with the council did police have to forcibly remove someone from the podium. He stated that Lieutenant Doug Gray was also present during the council meeting. Layne could not recall if the audience started chanting before or after the council left the room.

Officer Joseph R. Harper of the Chattanooga Police Department testified that on May 19, 1998, he was dispatched for backup to the City Council meeting. He stated that when he and his partner, Officer Royval, arrived at the meeting, the council members were not in the room. He recalled that the Defendants were chanting, "No justice, no peace" and that the noise level in the room was "extremely loud." Harper testified that they proceeded to take the Defendants into custody. Harper explained that Mitchell was between the officers and Ervin and that when they approached him to take him into custody, he tightened his forearms in an effort to resist being handcuffed. He stated that it took twenty seconds to place Mitchell's hands behind his back.

Carol O'Neal was again recalled to testify. She identified an amended agenda from September 24, 1996 in which Ervin was listed as one of the two special presentations that evening.

II. ANALYSIS

A. Jury Selection

The Defendants argue that the State improperly excluded four African-American jurors with its peremptory challenges in violation of Article I, section 8 of the Tennessee Constitution and of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court has held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." Batson v. Kentucky, 476 U.S. 79, 89 (1986). Our supreme court outlined the procedure that a trial court should follow when a party objects to the exclusion of a juror on the basis of race:

> [T]he court must ascertain whether a prima facie case of purposeful discrimination has been established. This proffer or discussion should also occur outside the presence of the jury. If the court finds that a prima facie case has been established, the court must give the opposing party the opportunity to rebut the prima facie case by establishing a neutral reason for the exercise of the challenge. The objecting party must be allowed to respond as to why the reason is pretextual or inadequate. Thereafter, the court must determine, by considering all the facts and circumstances, whether the totality of the circumstances support a finding of purposeful discrimination.

Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 906 (Tenn. 1996) (footnote omitted). In addition,

> [a]lthough a trial court must accept a facially race-neutral explanation for purposes of determining whether the proponent has satisfied his burden of production, this does not mean that the Court is bound to believe the explanation in making its determination. In other words, while the court may find that the proffered explanation is race-neutral, the court is not required, in the final analysis, to find that the proffered explanation was the actual reason for striking the juror.

State v. Jerry W. Jordan, No. M1999-00813-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 828, at *13 (Tenn. Crim. App., Nashville, Oct. 11, 2001).

In this case, the State exercised only four peremptory challenges against four African-Americans. All three of the Defendants in this case were also African-American. The Defendants raised Batson challenges regarding the exclusion of those jurors, see Batson, 476 U.S. at 89, and the trial court found that the Defendants had demonstrated a prima facie case of discrimination. However, the prosecution then stated reasons for the exclusions which the trial court found were based on reasons other than race. The trial court found that the State had based its challenges on reasons other than race.

The prosecution stated that it challenged juror Arletra Bolten because she "had a very involved extensive experience with the police, very negative, she was very clear about that." In addition, Bolten's husband was represented in court by one of the Defendants' attorneys for the attempted first degree murder of a police officer. Bolten acknowledged that two years prior she had "been in a situation where there was a dispute with the police department" and in which she was a witness to a shooting. Bolten testified that her husband was charged with the attempted first degree murder of a police officer. She stated that she believed that the police were wrong in that situation and that they were "cover[ing] up" incorrect procedure on their part. According to Bolten, the police misrepresented the facts by "say[ing] something happened that didn't happen." She believed that the police "did the wrong thing intentionally" in that case. She testified that the charges in that case were either dismissed or reduced. Bolten noted that she became skeptical of the police after that incident. Although she stated that her past experience would not affect her decision in this trial, she acknowledged that she did not know if she would be able to "put it aside" to make a decision in this case. Bolten also testified that John C. Cavett, Jr., an attorney for one of the Defendants, represented her husband for the attempted murder charge.

The prosecution also challenged juror Mary E. Morgan, stating that "she felt that everyone's opinions should be heard and that she would not agree that there should be procedure or methods." The prosecution also noted that Morgan had read about this case in the newspaper and that her son had been convicted of a weapons charge. Morgan testified that she did not want to be a juror because she does not like criminal court. She stated that her son pleaded guilty to a weapons charge. Morgan maintained that she believed that her son was treated fairly. Finally, she stated that she disagreed with the law forbidding disruption of a meeting.

The prosecution challenged juror Teresa Blackman. The trial court stated that Blackman was "borderline mentally functioning" and close to being struck for cause. The court stated that the reasons for striking Blackman were "obvious." Blackman testified that "if they was [sic] sticking up for their rights, they had a right to do that." She acknowledged that she had already formed an opinion about the case before the trial began.

Finally, the prosecution challenged juror Letitia Thornton. The prosecution stated that Thornton was socially acquainted with a council member involved in this case, that she did not like her criminal court experience, that she saw the Defendant on the news the previous day, and that she nodded vigorously when someone asked her about acquittal. Thornton testified that she was a social acquaintance of Yusuh Hakeem, a member of the Chattanooga City Council. She also stated that she was uncomfortable being in criminal court.

We conclude that the trial court correctly determined that the State properly exercised its challenges of jurors. The State articulated valid, race-neutral reasons for each of the jurors that it challenged. The trial court then found that the reasons were legitimate and non-discriminatory. We find no abuse of discretion on the part of the trial court. This issue is without merit.

B. Sufficiency of the Evidence

The Defendants argue that insufficient evidence was presented at trial to convict them of the crimes charged. When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 324 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859.

This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.

In this case, the Defendants were convicted of disrupting a meeting. Tennessee Code Annotated § 39-17-306(a) provides as follows:

> A person commits an offense if, with the intent to prevent or disrupt a lawful meeting, procession, or gathering, the person substantially obstructs or interferes with the meeting, procession, or gathering by physical action or verbal utterance.

In addition, the prosecution must show that the Defendants "substantially obstruct[ed] the conduct of a lawful meeting with the specific intent of bringing the meeting to an early termination or effectively impairing the conduct of the assemblage by physical action or verbal utterance." State v. Ervin, 40 S.W.3d 508, 519-520 (Tenn. Crim. App. 2000).

Sufficient evidence was presented for a rational jury to find the Defendants guilty of the charged offenses. The State presented evidence that the Defendants approached the podium during the middle of a City Council meeting. The meeting had a specific sequence of items and speakers which were listed on the agenda. Evidence was presented that Ervin was upset that he would have to wait until the end of the meeting to speak. The videotape showed the Defendants approach the podium during the middle of the meeting and begin speaking. Defendant Ervin stated, "We're gonna do it our way." Officer Harper also testified that Defendant Mitchell "tightened his forearms" in an effort to avoid being handcuffed. The videotape of the meeting corroborated Harper's testimony. As a result of the Defendants' interruption, the council had to leave the room. This issue is without merit.

C. Constitutionality of Tennessee Code Annotated § 39-17-306

The Defendants argue that Tennessee Code Annotated § 39-17-306, the statute prohibiting the disruption of a meeting, is unconstitutional. However, our Court has previously ruled that this statute "can be authoritatively construed to conform to the legislative purpose of protecting the First Amendment rights of its citizens to peaceably assemble without impermissibly criminalizing a substantial amount of protected expressive activity and is, therefore, constitutionally valid." Ervin, 40 S.W.3d at 519.

D. Jury Instruction

The Defendants argue that the trial court erred by giving the jury a knowing and reckless mens rea instruction for the offense of disrupting a meeting. The statute at issue provides that an offender must have "the intent to prevent or disrupt a lawful meeting." Tenn. Code Ann. § 39-17-306(a) (emphasis added). When the definition of an offense does not specify a culpable mental state,

intent, knowledge, or recklessness is sufficient to establish the required mens rea. See Tenn. Code Ann. § 39-11-301(c). However, we note that in this case, the statute did specify that an offender act intentionally. Thus, we conclude that the trial court erred by giving the jury a knowing and reckless instruction for the offense of disrupting a meeting. A defendant has the constitutional right to complete and accurate jury instructions, and the failure to give such instructions deprives the defendant of the constitutional right to a jury trial. State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). For such error to be harmless, the State has the burden of establishing beyond a reasonable doubt that the error did not affect the outcome of the trial. See Momon v. State, 18 S.W.3d 152, 164 (Tenn. 1999). Based on the overwhelming evidence of guilt presented at the Defendants' trial, which included a videotape of the disruption, we conclude that this error was harmless beyond a reasonable doubt. Thus, this issue is without merit.

E. Jury Exposure to Media Reports

The Defendants argue that the trial court erred by failing to grant a mistrial on the basis that some jurors had been exposed to media reports regarding an incident which occurred in the courthouse on the first day of trial. The granting or denial of a mistrial is a matter within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). This Court will not disturb such a decision absent a finding of an abuse of discretion. State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." Id. A trial court should grant a mistrial only when it is of "manifest necessity." Id.; Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The burden of establishing a "manifest necessity" is upon the appellant. Williams, 929 S.W.2d at 388.

At the beginning of the second day of trial, the Defendants raised concerns that the jurors might have been exposed to media reports of an alleged incident that took place at the courthouse on the previous day. As a result, the trial court granted the Defendants' request for individual voir dire of the jurors to determine if they were aware of the media reports. The following jurors testified that they had been exposed to some extent to the reports. Juror number 72, Bascomb B. Taylor, Jr., stated that at church, his son-in-law asked him, "[D]id you know anything about any bullets being down there at the courthouse yesterday?" He replied that he did not know anything about bullets. He stated that he did not discuss the information with any other jurors. Juror number 54, Deborah Schrader, testified that when she took her granddaughter to school that morning, someone in the parking lot said that there had been bullets outside the courtroom. She stated that the incident had nothing to do with the charges in this case and that she would be able to disregard such information.

Juror number 60, Ginger Barnes, stated that the previous evening her husband asked her, "Was there a problem today?" She responded that she could not talk about it. She stated that her husband said there was some news, but she told him not to tell her about it. She stated that she left the room, and her husband did not say anything else. She also stated that there was some discussion that morning with the other jurors about a disturbance that happened the previous morning when someone had come to the courthouse with bullets. However, she said she did not know if it was

related to this case. She maintained that most of the jury was present during the discussion. She stated that the incident or discussion would not affect her judgment in this case.

The procedure relating to the selection of a fair and impartial jury is a matter entrusted to the sound discretion of the trial court. State v. Plummer, 658 S.W.2d 141, 143 (Tenn. Crim. App. 1983); see Tenn. R. Crim. P. 24(a). A trial court is granted wide discretion in ruling on the qualifications of the jurors, and a trial court's decision in this regard will not be overturned absent an abuse of discretion. State v. Kilburn, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989). When an issue arises concerning a prospective juror's exposure to information that may be inadmissible at trial, Tennessee Rules of Criminal Procedure Rule 24(b)(2) contemplates a determination by the trial court as to whether the information is so prejudicial as to create a substantial risk that the juror's judgment will be affected by the exposure to the information. If not, and the prospective jurors indicate, as in this case, that they will be impartial, then the acceptability of the prospective jury shall depend on whether the trial court believes the jurors' testimony that they are impartial. See Tenn. R. Crim. P. 24(b)(2)

The trial court overruled the Defendants' motion for a mistrial. It stated that it was convinced that the jurors did not know if what happened the previous day had anything to do with this case. According to the court, "They just heard that there were bullets in the courthouse." In addition, the trial court stated that not all of the jurors even knew about the incident. It asked the jurors if anything had happened that would in any way interfere with their ability to be fair and impartial. Finally, the trial court instructed the jury that anything that anyone might have inadvertently overheard concerning anything that happened in the courthouse "should be disregarded, as it has nothing to do whatsoever with this case." It is well settled that a jury is presumed to follow the trial court's instructions. State v. Blackmon, 701 S.W.2d 228, 233 (Tenn. Crim. App. 1985); State v. Compton, 642 S.W.2d 745, 746 (Tenn. Crim. App. 1982). From our review, we conclude in this case that the information known by several jurors was not so prejudicial as to create a "substantial risk," id., that their judgment would be affected and that the trial court determined that the jurors' testimony as to their impartiality was believable. Thus, we conclude that this issue is without merit.

F. Question Regarding Mitchell's Use of Force

Defendant Mitchell argues that the trial court erred by not permitting counsel for Mitchell to ask a witness about whether Mitchell used "force" against an officer. On direct examination, Officer Joseph R. Harper testified that as officers sought to remove the Defendants from the room, Mitchell "tightened his forearms" in an attempt to refuse to be handcuffed. Mitchell's attorney then cross-examined Harper. Counsel asked Harper, "[I]nstead of being able to pull [Mitchell's arm] back easy, . . . his muscles were flexed or tensed, and made it difficult for you to put the handcuffs on?" Harper replied that "[t]here was resistance to the movement." Counsel then asked, "[H]e did not ever strike you or kick you or slap you, or anything like that?" Harper replied in the negative. Counsel then asked if Mitchell used "any physical force" against him. Upon the State's objection, the trial court ruled that whether Mitchell used force against Harper was a jury question. Thereafter, counsel asked Harper if Mitchell physically touched him, and Harper replied that he did not.

A person resists arrest by "intentionally prevent[ing] or obstruct[ing] anyone known to the person to be a law enforcement officer . . . from effecting [an] . . . arrest . . . by using force against the law enforcement officer or another." Tenn. Code Ann. § 39-16-602(a). Force is defined as "compulsion by the use of physical power or violence and shall be broadly construed." Id. § 39-11-106(a)(12). We conclude that whether Defendant Mitchell used force against Officer Harper was a question for the jury to ultimately determine. In our view, the question asked of Officer Harper concerning Defendant Mitchell's use of force was a proper question. Although the trial court erred by not allowing counsel to question Harper regarding whether Mitchell used force, we find that such error was harmless. Counsel was able to elicit from Officer Harper that Mitchell did not physically touch him. Harper explained Mitchell's actions as he was trying to arrest him. He stated that Mitchell "tightened his forearms" as Harper was trying to place handcuffs on him. In addition, the jury was able to view the incident on videotape. This issue is without merit.

G. Improper Rule 3 Appeal by McGee

The trial court in this case placed Defendant McGee on judicial diversion pursuant to Tennessee Code Annotated § 40-35-313. According to this statute, the trial court may, in its discretion, following a determination of guilt, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. Tenn. Code Ann. § 40-35-313(a)(1)(A). A qualified defendant is one who pleads guilty or is found guilty of a misdemeanor or a Class C, D or E felony; who has not previously been convicted of a felony or a Class A misdemeanor; and who is not seeking deferral for a sexual offense or a Class A or Class B felony. Id. § 40-35-313(a)(1)(B)(I)(a)-(c); State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). If a Defendant successfully completes judicial diversion, the statute provides for expungement from "all official records . . . all recordation relating to the person's arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section." Tenn. Code Ann. § 40-35-313(b).

However, we note that "no appeal as of right lies from a grant of judicial diversion because there is no judgment of conviction from which to appeal pursuant to Tennessee Rule of Appellate Procedure 3." State v. Adrian Lumpkin, No. W2002-00648-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 1030, at **3-4 (Tenn. Crim. App., Jackson, Nov. 27, 2002). This Court has previously held that because a defendant was granted, rather than denied, judicial diversion, and because she had received no judgment of conviction, she had no appeal as of right. State v. Norris, 47 S.W.3d 457, 463 (Tenn. Crim. App. 2000). Rather, "an appeal as of right is available only when there has been a judgment of conviction, where the trial court has denied or revoked probation, or in certain circumstances which are not applicable here." State v. Teresa Dockery, No. E2001-01493-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 463, at *6 (Tenn. Crim. App., Knoxville, May 23, 2002) (citing Tenn. R. App. P. 3(b)). Thus, unless a defendant violates conditions of the trial court pursuant to judicial diversion, there is no judgment of conviction. State v. Teresa Dockery, 2002 Tenn. Crim. App. LEXIS 463, at *6. Although Defendant McGee's appeal is not properly before this Court pursuant to Tennessee Rule of Appellate Procedure 3, we have nonetheless addressed each of the issues in our review of the Rule 3 appeals of Defendants Ervin and Mitchell. We conclude that all

of the issues raised by the Defendants, including those raised by Defendant McGee, are without merit.

Accordingly, the judgment of the trial court is AFFIRMED.

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ROBERT W. WEDEMEYER, JUDGE